

MALAYSIA BUILDING SOCIETY BHD.

v.

CHEE ENG SHOT & ORS.

HIGH COURT MALAYA, JOHOR BAHRU

ABU MANSOR ALI J

[CIVIL SUIT NO. 23-123 OF 1987]

18 FEBRUARY 1989

CIVIL PROCEDURE: *Dismissal of O. 14 application against guarantor - Appeal - No demand made to 1st defendant - Preliminary objections - Fresh evidence tendered after summary judgment decision.*

This is an appeal against the dismissal of the plaintiff's application under O. 14, against the third defendant guarantor, of a loan granted to the 1st defendant, who had taken a housing loan from the plaintiff. The third defendant denied that he was a guarantor.

The respondent had opposed the appeal on two grounds. Firstly, that the respondent did not execute the guarantee document and secondly that the appellants had not made demand on the first defendant and submitted that until demand is made nothing is payable and the 3rd defendant's liability does not arise.

The respondent also raised two preliminary objections. First, was the fact that the appellant used an affidavit which contained the 'notice of demand' to the defendant and a statement of account of a branch manager of the appellant's bank which was affirmed by one Supardi b. Hj. Sarlan which was filed after the O. 14 decision.

The respondent contended that an appeal against a summary judgment, was an appeal from a judgment after a hearing 'on the merits, since the Judge could only give judgment for the plaintiff if he was satisfied that there were no merits on the defendant's side so as to warrant giving the defendant leave to defend. Such additional evidence could only be admitted on special grounds.

The appellant contended, that the affidavit sought to be admitted, is admissible, as the appeal is a rehearing of the case.

Held:

[1] It is open for the plaintiff to choose. The guarantor has nothing special to demand that the creditor call upon the principal debtor to pay off the debt first before asking the guarantor to pay.

[2] It is clear law that there is no necessity for the creditor to make a demand upon the guarantor before enforcing the guarantee unless the terms of the guarantee requires it. From the contract, it is clear that there must be a demand and it is for the appellant to prove that a demand was in fact made. On this issue alone, there is an issue to be tried, since the appellant has not proved there has been such demand and the matter should go to trial.

[Appeal is therefore dismissed with costs.]

Cases referred to:

Langdale & Anor. v. Danby [1982] 3 All ER 129

See Hua Daily News Bhd. v. Tan Thien Chin & Ors. [1986] 2 MLJ 107

Pan-Electric Appliances (Pte.) Ltd. v. Electrical & Allied Industries Bhd. [1988] 2 CLJ 473

Bank Bumiputra Malaysia Bhd. v. Esah Binti Abdul Ghani [1985] CLJ (Rep) 41

Mok Hin Wah & Ors. v. United Malayan Banking Corp. Bhd. [1987] CLJ (Rep) 219

a Legislation referred to:

Rules of the High Court 1980, O. 14

Rules of the Supreme Court [UK], O. 59 r. 10(2)

Other Sources referred to:

Supreme Court Practice, [1985] (White Book) O.14/3-4/38

b *For the plaintiff/appellant - R.W.W. Brockett; M/s. Brockett & Cho*

For the 3rd defendant/respondent - M. Pathmanathan; M/s. Yusuf Lee Pathma & Marbeck

JUDGMENT**Abu Mansor Ali J:**

c Plaintiff appeals against the decision of the learned Senior Assistant Registrar dated 8 June 1988 dismissing the plaintiff's application against the third defendant guarantor of a loan granted to the 1st defendant under O. 14 of the Rules of the High Court 1980.

d At the outset of this appeal, the respondent raised two preliminary objections. One was the use by the appellant of an affidavit affirmed by one Supardi b. Hj. Sarlan affirmed on 24 August 1988 and filed in on that date, well after the decision of the learned Senior Assistant Registrar. Respondent's Counsel cited *Langdale & Anor. v. Danby* [1982] 3 All ER 129, 131 where it was held that on a true construction of O. 59 r. 10(2) of the Rules of the Supreme Court an appeal against a summary judgment given under O. 14 of the Rules of the Supreme Court, was an appeal from a judgment after a hearing 'on the merits', since the Judge could only give judgment for the plaintiff if he was satisfied that there were no merits on the defendant's side as to warrant giving the defendant leave to defend. That being the case, such additional evidence could only be admitted except on special grounds. The decision was affirmed by the "*Gudermes*" [1984] Lloyd's Law Reports 5 where there were no special circumstances shown to justify the bringing of evidence after the appeal. Respondent's Counsel says this position has been accepted in Malaysia in *See Hua Daily News Bhd. v. Tan Thien Chin & Ors.* [1986] 2 MLJ 107, 110 where the Supreme Court held that before fresh evidence can be adduced after judgment, the appellant must show not only that the evidence was relevant and material but it could not have been obtained with reasonable diligence for use at the original trial. The two fresh evidence whose admission the respondent objected to, at this stage, was the 'notice of demand' to the defendant which was the bone of contention before the Senior Assistant Registrar in the O. 14 summons and a statement of accounts of a branch manager of the appellant's bank. It is not difficult to see that these two items sought to be admitted now were pertinent to the plaintiff's claim and could have been easily obtained for the O. 14 summons. There was no excuse they were not.

g Mr. Brockett, for the appellant, contended that these objected to evidence is admissible and cited *Supreme Court Practice* (1985) (White Book) O. 14/3-4/38 and the authority of *Pan-Electric Appliances (Pte.) Ltd. v. Electrical & Allied Industries Bhd.* [1988] 2 CLJ 473 where the Court held that it was not improper for the appellant to file a supplementary affidavit before the appeal was heard to include the plaintiff's claim for services rendered.

h Appellant's Counsel submitted that the affidavit of one Supardi dated 24 August 1988 sought to be admitted is admissible as the appeal is a rehearing of the case and the account would show how far the third defendant is liable as guarantor.

i I exercised my discretion and rejected the affidavit of Supardi affirmed on 24 August 1988. The evidence to which it relates could easily be available before the trial, before the Senior Assistant Registrar, and as it also relates to a notice of demand and statements of accounts

which properly should have been filed before the trial before the Senior Assistant Registrar. The non-filing of them have consequences which could prejudice the defendant. They were therefore excluded.

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On the question of the respondent's second objection that there was a delay of 5 months in filing the O. 14 application I dismissed that objection as I was satisfied with the appellant's explanation that they were proceeding first against the 1st defendant before going to the present 3rd defendant.

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Mr. Brockett began by giving the outline of the facts of this case which was as follows. The 1st defendant took out a housing loan from the plaintiff. The plaintiff alleges that third defendant was the guarantor. This was denied by the 3rd defendant. In 3rd defendant's defence, Encl. (7), he denies any knowledge of the loan and that of the guarantee. In reply to Encl. (7), plaintiff files Encl. (21) Exhibit B, a copy of the annexure of the legal charge. Counsel also referred to SHH2 attached to Encl. (10) copy of the guarantee agreement signed by the 3rd defendant on 16 April 1985. In respect of 3rd defendant's defence in para. 6 of statement of defence Encl. (7) that the plaintiff refused to release the sum, the plaintiff replied in SHH3 *vide* letter dated 10 June 1985 relating to how much was paid and SHH4 also dated 10 June 1985 advising commencement of repayment of monthly instalment of the loan. Enclosure (21) Exhibit A in the schedule shows the release of RM120,000 to the borrower. The 3rd defendant has not, in any affidavit, disputed that amount and appellant's Counsel says he is therefore taken to have admitted this fact and his allegation in para. 6 of statement of defence was a mere allegation on his part.

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On the 3rd defendant's allegation, in para. 7 of statement of defence, that the plaintiff having taken a legal charge of 1st the defendant's land, by way of security, the 3rd defendant is only liable for the difference of 1st defendant's debt after plaintiff's realisation of that security, appellant's Counsel referred the Court the charge document Encl. (21) Exhibit B para. 1 para. 6 which sets out the events in which the balance sum owing by the 1st defendant is due. As for the liability of the guarantor Encl. (10) Exhibit SHH2 para. 6 states:

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Without prejudice to any right of the guarantor against the borrower as principal debtor, the guarantor, as between himself and the society shall be deemed to be a principal debtor and not merely a surety ...

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It is quite clear on authorities cited that it is open for the plaintiff to choose what way to proceed. Plaintiff's Counsel cited *Bank Bumiputra Malaysia Bhd. v. Esah Binti Abdul Ghani* [1985] CLJ (Rep) 41 where Supreme Court discussed the point and came to decide on authority that the guarantor has nothing special to demand that the creditor call upon the principal debtor to pay off the debt first before asking the guarantor to pay.

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In answer to the 3rd defendant's allegation in para. 1 and para. 2 of the affidavit-in-reply (22) that there should have been a demand, the appellant's Counsel says that there is no such general rule that there must be one for every case. Counsel cited the unreported case *Public Bank Berhad v. Chan Siok Lie & 2 Ors.* (Kuala Lumpur Civil Suit No. C3599 of 1985) where the learned Judge, after examining the authorities, held it is clear law that there is no necessity for the creditor to make a demand upon the guarantor before enforcing the guarantee unless the terms of the guarantee requires it. Appellant's Counsel says the guarantee in the instant case requires no such demand.

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Mr. Pathmanathan for the respondent opposed this appeal on two grounds. Firstly, that the respondent denied executing the guarantee document and that the respondent also denied that the appellant had demanded the sum owed by the 3rd respondent.

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- a** On the issue of whether there was a demand or not the appellant in para. 7 of their statement of claim (1) had stated that the 1st defendant had agreed that the loan is repayable at any time upon demand by the plaintiff. In para. 9 of the statement of claim, the plaintiff admit by their pleadings that they had made request for payment but the 3rd respondent contends that the plaintiff had not made demand on the 1st defendant in accordance with clause 1 of Exhibit B Encl. 21. Respondent's Counsel submitted that until the demand is made nothing is payable and the 3rd defendant's liability does not arise.
- b**

- I am of the view that the respondent has succeeded in his submission that it is for the appellant to prove this claim to the hilt. I think it is also worth remembering, the stage of this matter, that is it is an appeal against the dismissal of the O. 14 application before the learned Senior Assistant Registrar. In view of *Mok Hin Wah & Ors. v. United Malayan Banking Corp. Bhd.* [1987] CLJ (Rep) 219 where it was held that the law was clear, that
- c** there must be a demand and it is for the appellant to prove that a demand was in fact made. To this must be added that such a demand is a prerequisite if the contract of guarantee requires that it be so. I am of the view from the term of clause 1 of Exhibit B in Encl. 21 it is clear that it is a term of the contract that there must be a demand.

- d** I therefore rule on this issue alone there is an issue to be tried since the appellant has not proved that there has been such demand and the matter should go to trial. I rule therefore that the appellant fails in this appeal and I confirm the order of the learned Senior Assistant Registrar dismissing this matter. This appeal is therefore dismissed with costs. There is no need to address myself as to the other issue whether the 3rd defendant did in fact sign the guarantee agreement which is an issue in the matter before the Senior Assistant Registrar and which no doubt will still be an issue at the proper trial.

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Also found at [1990] 1 CLJ 97

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